STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	SUPREME COURT NO. 121310
PLAINTIFF-APPELLANT,	COURT OF APPEALS NO. 235518
v	LOWER COURT NO. 99-95646-FH
GERALD LEE BABCOCK,	
DEFENDANT-APPELLEE.	

JOHN G. MC BAIN (P47476)
PROSECUTING ATTORNEY
JERROLD SCHROTENBOER (P33223)
CHIEF APPELLATE ATTORNEY
312 S. Jackson Street
Jackson, MI 49201-2220
(517) 788-4283

BRUCE A. BARTON (P10512)
ATTORNEY FOR DEFENDANT-APPELLEE
414 S. Jackson Street
Jackson, MI 49201
(517) 780-0800

REPLY BRIEF

JERROLD SCHROTENBOER (P33223)
CHIEF APPELLATE ATTORNEY

RECEIVED
DEC 27 2002
CORBIN DAVIS
CLERK SUPREME COURT

TABLE OF CONTENTS

Index of Authorities ii

Statement of the Question Presented iii

Statement of Facts 1

Argument 2-9

THE TRIAL COURT'S REASONS FOR DEVIATING FROM THE GUIDELINES--(1) DEFENDANT AND SOCIETY WOULD BE BETTER SERVED WITHOUT A PRISON SENTENCE, (2) THE PROBATION DEPARTMENT RECOMMENDED PROBATION, (3) THE TRIAL DEFENSE LAWYER BELIEVED THAT THE JUDGE WOULD BE ABLE TO DEPART DOWNWARD, (4) DEFENDANT'S NO LONGER BEING THE PRIMARY CARE GIVER TO HIS BROTHER (AFFLICTED WITH CEREBRAL PALSY AND MENTAL RETARDATION) WOULD REQUIRE HIM PLACED HIM IN A NURSING HOME, AND (5) DEFENDANT HIMSELF HAS DISC HERNIATION–DID NOT JUSTIFY GIVING A TWO MONTH SENTENCE WHERE THE GUIDELINES CALL FOR 36 - 71 MONTHS.

Relief 9

INDEX OF AUTHORITIES

People v Fields, 448 Mich 58; 528 NW2d 176 (1995) 3, 6

United States v Chance, 306 F3d 356 (CA 6, 2002) 8

United States v Cooper, 302 F3d 592 (CA 6, 2002). 8

MCL 769.34(3)(a) 2

MCL 769.34(11) 2, 3, 7

MCR 2.613(C) 3

MCR 7.302(B)(5) 5

STATEMENT OF THE QUESTION PRESENTED

DO THE TRIAL COURT'S REASONS FOR DEVIATING FROM THE GUIDELINES--(1) DEFENDANT AND SOCIETY WOULD BE BETTER SERVED WITHOUT A PRISON SENTENCE, (2) THE PROBATION DEPARTMENT RECOMMENDED PROBATION, (3) THE TRIAL DEFENSE LAWYER BELIEVED THAT THE JUDGE WOULD BE ABLE TO DEPART DOWNWARD, (4) DEFENDANT'S NO LONGER BEING THE PRIMARY CARE GIVER TO HIS BROTHER (AFFLICTED WITH CEREBRAL PALSY AND MENTAL RETARDATION) WOULD REQUIRE HIM PLACED HIM IN A NURSING HOME, AND (5) DEFENDANT HIMSELF HAS DISC HERNIATION–JUSTIFY GIVING A TWO MONTH SENTENCE WHERE THE GUIDELINES CALL FOR 36 - 71 MONTHS?

THE TRIAL COURT AND
THE COURT OF APPEALS ANSWERED: YES

PLAINTIFF-APPELLANT ANSWERS: NO

STATEMENT OF FACTS

Plaintiff relies on its Statement of Facts found in its November 5, 2002, Appellant's brief except to mention that the complete cite for this Court granting leave to appeal is 467 Mich 872; 651 NW2d 921 (2002), and the complete cite for this Court granting leave to appeal in the companion case, *People v Aliakbar*, is 467 Mich 871; 651 NW2d 921 (2002).

ARGUMENT

THE TRIAL COURT'S REASONS FOR DEVIATING FROM THE GUIDELINES--(1) DEFENDANT AND SOCIETY WOULD BE BETTER SERVED WITHOUT A PRISON SENTENCE, (2) THE PROBATION DEPARTMENT RECOMMENDED PROBATION, (3) THE TRIAL DEFENSE LAWYER BELIEVED THAT THE JUDGE WOULD BE ABLE TO DEPART DOWNWARD, (4) DEFENDANT'S NO LONGER BEING THE PRIMARY CARE GIVER TO HIS BROTHER (AFFLICTED WITH CEREBRAL PALSY AND MENTAL RETARDATION) WOULD REQUIRE HIM PLACED HIM IN A NURSING HOME, AND (5) DEFENDANT HIMSELF HAS DISC HERNIATION–DID NOT JUSTIFY GIVING A TWO MONTH SENTENCE WHERE THE GUIDELINES CALL FOR 36 - 71 MONTHS.

Plaintiff is filing this reply brief to make five major points.

First. **The Court of Appeals review standard**. Defendant is the only one of the four parties in this consolidated appeal who asks this Court to review for an abuse of discretion whether or not the reasons given to depart from the guidelines amount to "a substantial and compelling reason." In its appellant's brief, plaintiff said that the review should be "de novo." (Pp 6-10). Defendant in *Aliakbar* agrees: "Whether a stated reason is one of the factors prohibited by MCL 769.34(3)(a), or a factor already taken into account in the guidelines, is a question of law, and should therefore be reviewed de novo." (P 8). Last, plaintiff in *Aliakbar* also asks for a de novo review:

> Under the plain language of MCL 769.34(11), an appellate court does not grant deference to a trial court's determination that its reason for departing from the sentence range was a substantial and compelling one. Rather, the appellate court reviews the record and reverses if it "finds" that "the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range." While that review appears somewhat akin to a de novo review, the clear language of the statute does not authorize consideration of

> reasons rejected or not considered by the trial court. The court's inquiry is limited to the *trial court's* reasons for departing, with proper deference to the trial court's findings of fact. (Footnotes omitted). (Pp 19-20).

In being the only one asking this Court to interpret the statute calling for an abuse of discretion, defendant looks at the wrong part. MCL 769.34(11) states:

> If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

While ignoring the clause "the court of appeals finds," defendant looks exclusively at "a substantial and compelling reason." Just because this statute, however, has "a substantial and compelling reason" rather than "substantial and compelling reasons" has nothing to do with how much deference the appellate court is to give the sentencing court. The clause "the court of appeals finds" calls for nothing but a de novo review.[1]

Just because this Court in *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995), said that whether or not the reasons given amount to substantial and compelling reasons for departure should be reviewed for an abuse of discretion does not mean that it should be reviewed the same here. As both plaintiffs have pointed out, the drug laws do not have an appellate review statute. The guidelines law, on the other hand, does. The Court of Appeals was right in questioning blindly applying *Fields* in this, a different

---

[1]Actually, plaintiff in *Aliakbar* correctly points out that the review is not 100% de novo. In a true de novo situation, the appellate court will look at any consideration available. This statute, instead, restricts the considerations to the ones that the sentencing court actually used. Other than deference viewing factual findings for clear error, MCR 2.613(C), the statute fails to call for any deference in evaluating the reasons given.

situation. 250 Mich App 467, n 3. (97a).

In essence, in calling for a very wide review standard, defendant ignores the main purpose behind the guidelines in the first place, reduced sentencing disparities in this State. Plaintiff in *Aliakbar* cogently explains:

> In creating mandatory guidelines, the Legislature clearly restricted the exercise of that discretion in an effort to reduce disparity in sentencing.
>
> * * *
>
> Departures, however, remain the exception. A broad construction of the phrase "substantial and compelling" would widen the exception and, contrary to the legislative purpose, increase the possibility of sentencing disparity. (P 17).

A broad review standard not only allows the court to develop meaningful standards, but it actually helps reduce disparities. On the other hand, a deferential review standard will undermine the statute and allow for broad disparities. The other three, not defendant, are correct. The proper review standard for determining whether or not the reasons given amount to "a substantial and compelling reason" is to be reviewed, essentially, de novo.

Second. **Supreme Court review standard**. Once again, defendant alone takes the position that he takes. While he claims that this Court should give deference to the Court of Appeals' decisions, plaintiff and both parties in *Aliakbar* claim that this Court's review should be the same as the Court of Appeals'. Plaintiff did so on page 13, footnote 5. Defendant in *Aliakbar* said: "no constitutional or statutory provision exists which limits the review power of the Supreme Court or precludes it from passing it upon the propriety of sentences imposed by trial courts, and the constitutional right to an appeal in a criminal

case includes the right to sentence review." Plaintiff in *Aliakbar* then more directly said: "The People contend that the respective courts undertake the same review." (P 26).

Defendant's position has utterly no precedent whatsoever. In no other situation in Michigan law does this Court have a more restricted review than the Court of Appeals does. Other than citing to MCR 7.302(B)(5), defendant cites to nothing for this unique position. As it is, MCR 7.302(B)(5) does not in the least support him. This court rule deals with situations generally when this Court will accept leave to appeal in the first place. It has nothing to do with the deference that this Court will give Court of Appeals decisions once leave has been granted.

Third. **Substantial and compelling**. In claiming that his physical and family amount to substantial and compelling reasons, defendant gives little more than lip service to punishment. He ignores that he repeatedly sexually abused this girl, blamed her for it, and helped institutionalize her. Instead, he sees sentencing as being all about himself and his own needs. The sentence given is a sentence far more appropriate for a misdemeanor than for what defendant did. Where is the punishment? Where is the true deterrence for such a slight sentence?

Defendant's claim that "it would be contrary to the basic principals [sic] of the American Criminal Justice System and simply wrong to terminate the present effective supervised probation and therapy and long term rehabilitation of this Defendant in favor of confinement among hardened offenders with inadequate facilities for treatment and counseling," (p 4) would apply in just about every situation. For example, such an argument would be just as valid if defendant had committed (and been convicted o

degree murder then showed true signs of rehabilitation. One could just as easily point to the expense of locking up such a person and his loss of potential as a productive society member in arguing that the statute's mandatory requirement, life imprisonment, not be followed in this particular case. In other words, defendant's argument proves too much.

As it is, further, defendant does not cite to a single case or otherwise to support his claim that any of Judge Alexander Perlos' enunciated reasons amount to a substantial and compelling reason to deviate downward. Further, other than conclusorily claiming that the federal system is "totally different from that in Michigan" (p 13), he does not deal with any of plaintiff's cited cases. Even though the federal guidelines system is in fact somewhat different, this Court need not necessarily therefore ignore it. In mentioning very little about what constitutes a substantial and compelling reason, the Legislature left such fine tuning to the courts. That Congress has decided that certain factors are disfavored in deviating from the federal guidelines is, although not binding, relevant. That the entire federal system (with an easier standard for deviating) discourages the very factors that Judge Perlos relied on stands for something. It stands for more than defendant's unsupported say so.

Next, defendant does not in the least address plaintiff's claim that he "has not in the least claimed that he will not be able to obtain medical care in prison." (P 20). Nor does he actually deny that, at worst, his brother "will be sent to a private nursing home (for as long as defendant is not at home) without any extra cost to the family." (P 16). His silence is telling.

Last, defendant does not once argue that any of the reasons (either

separately or altogether) "keenly" or "irresistibly" grabs our attention (as required in *Fields).* Once again, the omission is telling.

Fourth. **Improper/proper reasons.** Defendant's claim that the appellate court should affirm the sentencing court's deviation as long as one reason amounts to a substantial and compelling reason even if all of the others given are improper ignores the following language from this Court's decision in *People v Fields*, 448 Mich 80:

> Sentencing normally is not a job for the appellate court, the usual procedure being to send the case back to the trial judge for resentencing if it found that the sentence is in some respect deficient. (Citation omitted). It is unclear whether the trial judge in this case would have found substantial and compelling reasons to deviate from the statutory minimum solely on the basis of objective an verifiable factors.

Just because the guidelines statute says "a substantial and compelling reason" rather than "substantial and compelling reasons" does not change the matter. If it had known that a number of factors being considered are legally improper, the sentencing court would not necessarily have deviated (at least to that extent). Therefore, plaintiff in *Aliakbar* quite correctly points out: "If the appellate court determines that some of the trial court's reasons were substantial and compelling but others were not, it should remand for resentencing unless the record reveals that the trial court would have imposed the same sentence had it not relied on the erroneous reason." (P 7). Of course, in the present case, nothing shows that Judge Perlos would have imposed precisely the same sentence no matter how many of his enunciated reasons were eventually declared improper.

Fifth. **Deviation degree**. Defendant does not even address what the proper standard should be for evaluating degree deviations.

On the other hand, plaintiff in *Aliakbar* did. In relying on Seventh Circuit cases, it asks this Court to set up some type of test requiring the appellate court to link the departure's degree to the guidelines structure. (P 25). In thinking the matter over, plaintiff now prefers this approach to the *Milbourn* proportionality analysis proposed in its original brief.[2] Such an approach allows for more easily workable standards than plaintiff's proposed *Milbourn* analysis.

In fact, the Sixth Circuit has a test that sets up even more easily workable standards. The deviation degree is reviewed for reasonableness–the "amount and extent of the departure in light of the grounds for departure." *United States v Chance*, 306 F3d 356, 397 (CA 6, 2002). In deviating, the judge must "move stepwise up [or down] the ladder" explaining why each step skipped over is inadequate. *United States v Cooper*, 302 F3d 592, 597-598 (CA 6, 2002).

In other words, finding a substantial and compelling reason to depart merely puts the case into the next grid. To put the case into a grid further away , the judge must specifically justify why each of the intervening grids is inadequate. Thus, in the present case, a substantial and compelling reason to depart, by itself, merely reduces the sentence guideline range from "36-71" (CV) range to "29-57" range (either CIV or BV). Therefore, to escape an abuse of discretion, Judge Perlos would have had to have justified a five step

---

[2]This analysis is different from defendant's analysis in *Aliakbar*. Plaintiff suggested that the *Milbourn* proportionality analysis be used exclusively for evaluating whether or not the deviation degree should be upheld. In *Aliakbar*, defendant seems to be claiming that *Milbourn*'s analysis should apply to the entire review process. Plaintiff completely disagrees with this analysis. The review statute, MCL 769.34(11), cannot reasonably be read supporting such an approach.

deviation, all the way down to either BI or AII, "0-17 months."

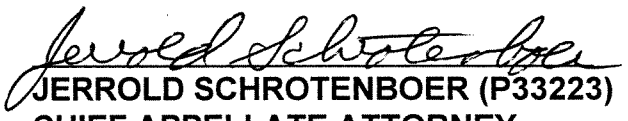
As it is, this analysis starkly makes plaintiff's point. This truly is a sentence more appropriate for a misdemeanor than for the offense than defendant committed. This sentence is even within the lowest guideline possible, AI, 0-11 months. At the very least, the degree of the deviation is truly an abuse of discretion.[3]

RELIEF

ACCORDINGLY, plaintiff again asks this Court to reverse and remand for resentencing.

Respectfully submitted,

December 26, 2002



JERROLD SCHROTENBOER (P33223)
CHIEF APPELLATE ATTORNEY

[3]As it is, however, plaintiff has no particular vested interest in any of these proposed systems. Under only the most extremely deferential standard, almost repudiating any ability to review, would this sentence survive.